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No. 203

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In the

Supreme Court of the United States

OCTOBER TERM, 1965.

WILLIAM JOSEPH BREAULT and
BONNIE JO ELLEN KATHRYN BREAULT,
Petitioners,

vs.

HAROLD L. FEIGENHOLTZ and RICHARD DAHM, individually and as Executors and Trustees under the Last Will and Testament of KATHRYN M. BREAULT, deceased; HAROLD L. FEIGENHOLTZ, as Executor of the Last Will and Testament of OSCAR J. BREAULT, deceased; HAROLD L. FEIGENHOLTZ, as Trustee and EUGENE A. BUSCH, Successor Trustee under the Last Will and Testament of OSCAR J. BREAULT, deceased; IRMA MEYERS, LITTLE SISTERS OF THE POOR OF CHICAGO, ST. HEDWIG INDUSTRIAL SCHOOL FOR GIRLS, POLISH MANUAL TRAINING SCHOOL FOR BOYS, ESTELLE ANGELA BREAULT, KENNETH BREAULT and WESLEY MEMORIAL HOSPITAL, a Corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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No.

WILLIAM JOSEPH BREAULT and
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vs.

HAROLD L. FEIGENHOLTZ and RICHARD DAHM, individually and as Executors and Trustees under the Last Will and Testament of KATHRYN M. BREAULT, deceased; HAROLD L. FEIGENHOLTZ, as Executor of the Last Will and Testament of OSCAR J. BREAULT, deceased; HAROLD L. FEIGENHOLTZ, as Trustee and EUGENE A. BUSCH, Successor Trustee under the Last Will and Testament of OSCAR J. BREAULT, deceased; IRMA MEYERS, LITTLE SISTERS OF THE POOR OF CHICAGO, ST. HEDWIG INDUSTRIAL SCHOOL FOR GIRLS, POLISH MANUAL TRAINING SCHOOL FOR BOYS, ESTELLE ANGELA BREAULT, KENNETH BREAULT and WESLEY MEMORIAL HOSPITAL, a Corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on February 21, 1966, which affirmed (a)

the denial of a petition to approve the settlement of controversies among all of the beneficially interested parties to said controversies, (b) a declaratory judgment and (c) the dismissal of a count in the Amended Complaint seeking an accounting from trustees.

I.

CITATIONS TO OPINIONS BELOW.

The opinion of the district court is printed in the Appendix (App. 121-142) prepared for the use of the court below, filed pursuant to paragraph 3 of Rule 21 and is reported in 250 F. Supp. 551. The opinion of the Court of Appeals, printed in Appendix A hereto, *infra*, p. 1a, is reported in 358 F. 2d 39.

II.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 21, 1966 (App.B., *infra*, p. 13a). Timely petitions for rehearing and rehearing *en banc* were denied on April 13, 1966 (App.C and D, *infra*, pp. 14a-15a). The mandate of the court below has been stayed (App.E., *infra*, p. 16a). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

III.

THE QUESTIONS PRESENTED.

A. Did the Court of Appeals deprive Kentucky children of the right to have their diversity action against an Illinois attorney, well known to the bench and bar of Illinois, decided under applicable Illinois decisions?

1. Did the Court of Appeals err in refusing to follow the leading case of *Wolf* v. *Uhlemann*, 325 Ill. 165, 156 N.E. 334 in which a settlement of a genuine controversy over the validity of a spendthrift trust was approved?

2. Did the Court of Appeals err when it "rejected" *Tree* v. *Continental Illinois National Bank and Trust Company*, 346 Ill.App. 509, 105 N.E. 324 "insofar as *Tree* indicates that such a trust could be abrogated under the family settlement doctrine if there was substantial doubt as to its validity"?

3. Did the Court of Appeals err when it held that the controlling Illinois precedent was *Altemeier* v. *Harris*, 403 Ill. 345, 355, 357 which involved a spendthrift trust that long since had been judicially validated and construed and was not the subject of a genuine controversy and in which *Wolf* v. *Uhlemann*, 325 Ill. 165 was not distinguished in the manner recited by the Court of Appeals?

4. Was there a plain misinterpretation of Illinois decisions which did violence to the principal that in diversity cases federal courts must follow state law?

B. Was it proper for the Court of Appeals to affirm the dismissal of Count II of petitioners' amended complaint containing unanswered allegations showing that petitioners are children of Oscar Breault, deceased, entitled as his descendants to their intestate share of his estate if his contested will was unduly influenced, that Oscar was entitled to the net income of his mother's testamentary trust in his lifetime, that Oscar did not receive all of such income, that no proper accounting was made to him in his lifetime and praying for an accounting from the inception of the trust and such other and further

relief as they may show themselves entitled to receive, particularly when the Supreme Court of Illinois in *In re Estate of Breault,* 29 Ill.2d 165, 180 has held that petitioners "are not without a remedy or a tribunal to pursue such claims should they so desire" and the Appellate Court of Illinois in an intervening decision, *In re Estate of Breault,* 63 Ill.App.2d 246, 261, has held that Count II seeks such complete accounting?

IV.

The Constitutional Provision Involved:

Article III, Sec. 2.

"The judicial Power shall extend • • • to Controversies • • • between Citizens of different States • • •."

V.

The Statute Involved:

The Rules of Decision Act, 28 U.S.C. Sec. 1652.

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." June 25, 1948, c. 646, 62 Stat. 944.

VI.

STATEMENT OF THE CASE.

A. FEDERAL JURISDICTION.

Petitioners are citizens of Kentucky and respondents are citizens of Illinois. (App. 73). The amount in controversy is greatly in excess of $10,000.00 exclusive of interest and costs. (App. 74). Diversity jurisdiction of the District Court was invoked under 28 U.S.C. Sec. 1332.

B. THE KATHRYN BREAULT TESTAMENTARY TRUST.

Petitioners' grandmother, Kathryn Breault, was the owner of a substantial unincorporated business operated under the name "Brolite Company" (App. 34).

Shortly before Kathryn's death on August 3, 1952, the respondent, Harold L. Feigenholtz, of Chicago, Illinois became her attorney, obtained a power of attorney from her, discharged the manager of the business and assumed personal charge of its operation. (App. 35).

Kathryn executed a will dated July 22, 1952 (App. 39-48) giving the bulk of her substantial estate to Feigenholtz and Richard Dahm, as trustees, directing them to pay all of the net income to her son, Oscar J. Breault, "from the time of my death and as long as he shall live." (App. 44).

The will provided that all payments of income or distribution of principal to Oscar should be made to him "in person or upon his personal receipts." (App. 45-46). The will included the following provisions:

"At any time after three years of administration of this Trust, the Trustees named herein or their successors, feel that my said son, Oscar J. Breault, has become competent to personally handle the corpus of this Trust, the aforesaid Trustees are hereby given the power to terminate this Trust and to deliver to my said son, the entire corpus of this, my Trust." (App. 46).

"The Trustees shall not by reason of being such Trustees be disqualified to act as officer or director of any corporation in which the trust estate has stock in (sic) or to receive compensation from the said corporation for services rendered." (App. 41).

"In the event of any suit, directly or indirectly instituted by any beneficiary or beneficiaries hereunder against the Trustees to construe this trust or to terminate this trust, the cost, expenses and charges in connection with the said litigation shall be paid by the said beneficiary or beneficiaries and be deducted from said beneficiary or beneficiaries' distributive share." (App. 43).

"Upon the death of my son, Oscar J. Breault, the property of the Trust Estate shall be distributed according to the provisions and terms of the Last Will and Testament of my said son, Oscar J. Breault, and if he shall fail to execute a Will, or if such Will shall not be admitted to probate, I hereby direct distribution of the Trust Estate in the following manner:

One-third [thereof to each of three named charities]." (App. 45).

Prior to Kathryn's death, Feigenholtz and respondent, Eugene A. Busch, his nephew and law associate, organized an Illinois corporation called the Brolite Company, which remained a corporate shell until Kathryn's death when Feigenholtz and Busch caused the bank accounts of her sole proprietorship business to be transferred to the corporation and the business to be operated in the corporate form (App. 34-35).

Feigenholtz and respondent Dahm elected themselves and Busch as directors of the corporation. Feigenholtz became president and began to receive substantial salary, bonuses, travel expenses and counsel fees, (App. 35, Transcript of proceedings, April 22, 1965, page 30) for which he has never accounted, although required to do so under Illinois decisions, *Stone* v. *Baldwin,* 348 Ill.App. 225, 239, 243 (appeal denied 351 Ill.App. xvii). Feigenholtz and Dahm have never purported to account to anyone or to any court for the operation of or the income of the Brolite Company (App. 32-34). In 1960 petitioners were permitted to see income tax returns of the corporation caused to be filed by Feigenholtz for the five fiscal years beginning July 31, 1956 and ending July 31, 1960 and these show that the net earnings of said business during that period were more than $1,239,000. and that the net income after taxes was almost $700,000. (App. 35-36).

Oscar testified in a deposition on August 20, 1957 that the trustees paid him sometimes $100., sometimes $125. per week, sometimes less, that whatever he did receive depended on their discretion, (App. 34), that he had not paid more than $150. per month of the $300. per month allowance for the support of his children (petitioners herein) because he did not have the money but would have paid it if he had it. (App. 34).

C. THE CONTESTED WILL.

Oscar executed a purported will in Feigenholtz's law office dated November 18, 1954. He was then entirely dependent for his income upon what he received from the trustees under his mother's will. The purported will gives his personal estate and the appointed property

to Feigenholtz as trustee of a spendthrift trust (App. 49) and names Busch as successor trustee (App. 56).

The will gives "the net income from the Trust Estate" to Oscar's third wife, Estelle (App. 53).

It further provides as follows:

> "Upon the death of my wife, the Trustee shall distribute the net income from the Trust Estate to my beloved children, KENNETH BREAULT, WILLIAM JOSEPH BREAULT and BONNIE CATHERINE (sic*) BREAULT in equal installments not less frequently than quarter-annually up to the time that the youngest of my surviving children shall have attained the age of forty (40) years.
> (d) At the date that the youngest of my surviving children shall have attained the age of forty (40) years, the Trustee shall distribute the remaining principle of the Trust:" [five percent to KENNETH, five percent to WILLIAM JOSEPH BREAULT and five percent to BONNIE JO ELLEN "CATHERINE" BREAULT and eighty-five percent to WESLEY MEMORIAL HOSPITAL].
>
> "(e) In the event one of my beloved children predeceases me, or dies prior to the distribution of the principal of the Trust Estate, then and in that event his or her portion of the income or principal of the Trust Estate shall be then divided among my remaining children.
>
> "(f) In the event all of my beloved children shall die prior to the age of forty (40) years, this Trust shall terminate and the entire principal and accumulations of the Trust shall be forthwith distributed to WESLEY MEMORIAL HOSPITAL, an eleemosynary institution." (App. 53-54).

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* The name of Oscar's daughter, a petitioner herein, is spelled the same as Oscar's mother, Kathryn (Appendix 130, 250 F.Supp. 551-566) not Catherine, as it is spelled eleven times in Oscar's purported will.

The will drawn in Feigenholtz's law office substantially copies Kathryn's will, including grammatical errors. Like Kathryn's, it permits the trustee to be an "officer or director of any corporation in which the Trust Estate has stock in (sic) or to receive compensation from the said corporation for services rendered" (App. 50) and provides:

> "In the event of any suit, directly or indirectly instituted by any beneficiary or beneficiaries hereunder against the Trustee to construe this trust or to terminate this trust, the cost, expenses and charges in connection with the said litigation shall be paid by the said beneficiary or beneficiaries and be deducted from said beneficiary or beneficiaries' distributive share." (App. 52-53).

Unlike Kathryn's will, it provides as follows:

> "In the event of any suit, directly or indirectly, instituted by any beneficiary or beneficiaries against the Executor to construe the Will, or to terminate the Will, or to have the Will declared invalid, the cost, expense and charges in connection with the said litigation shall be paid by the said beneficiary or beneficiaries and shall be deducted from the said beneficiary's or beneficiaries' share." (App. 56).

Unlike Kathryn's will, it waives surety bond for the executor. (App. 56-57).

D. FEIGENHOLTZ'S EXECUTORSHIP.

Oscar died on July 16, 1959 and the purported will was admitted to probate on October 14, 1959. Kathryn's trust estate then included all of the stock in the Brolite Company. *In Re Estate of Breault*, 29 Ill.2d 165, 168.

After paying fees to themselves and their attorney, Busch, and the balance in their trustees' bank account

to Feigenholtz as administrator to collect of Oscar's estate, Feigenholtz and Dahm rendered a so-called account as of October 21, 1959 showing a zero balance which Feigenholtz, as administrator to collect, improperly approved on behalf of the estate. *In Re Estate of Breault,* 29 Ill.2d 165, 179.

An inventory was filed March 9, 1960, listing not only Oscar's personal assets but also all of the appointed assets as "property of the decedent" the total assets being fixed as in excess of $500,000.00. *In Re Estate of Breault,* 29 Ill.2d 165, 169.

E. THE "TURNING POINT" (29 Ill. 2d 165, 169).

On July 1, 1960, petitioners, then aged 16 and 14, respectively, by their mother, Florence, Oscar's divorced second wife, as next friend and guardian, all being Kentucky citizens, filed a will contest in the United States District Court for the Northern District of Illinois. Federal jurisdiction was asserted on the ground that there was diversity of citizenship and the amount in controversy was in excess of $10,000., exclusive of interest and costs. The complaint alleged that the execution of Oscar's purported will had been procured by undue influence on the part of Feigenholtz. (App. 77).

F. FEIGENHOLTZ'S EXECUTORSHIP CONTINUED.

Eleven days later, Feigenholtz filed an amended inventory in Oscar's estate, distinguishing between Oscar's personal assets fixed at $25,805. and the property over which Oscar had a "power of appointment or disposition." At the same time, Feigenholtz and Dahm, as trustees under Kathryn's will, filed their claims exceeding the amount of Oscar's inventoried personal estate, which

Feigenholtz, as executor, consented to and which were allowed in an *ex parte* hearing. Feigenholtz then filed a motion in the district court to dismiss the will contest, alleging that the jurisdictional amount was not involved in that Oscar's personal estate was insolvent and that if petitioners won the will contest, the three charities named in Kathryn's will would take the appointive estate to the exclusion of petitioners as Kathryn's and Oscar's heirs. *In Re Estate of Breault,* 29 Ill.2d 165, 170. (App. 78).

Alleging that Feigenholtz *inter alia* was fraudulently attempting to oust the Federal Court of its jurisdiction, petitioners filed a *statutory** proceeding in the Probate Court of Cook County to remove him as executor. *In Re Estate of Breault,* 29 Ill.2d 165, 170.

In the course of the removal proceedings, Feigenholtz, as executor, filed his first account, alleging therein that the estate had no claim against him and Dahm as trustees under Kathryn's will for any unpaid income. *In Re Estate of Breault,* 29 Ill.2d 165, 171, 179.

The Probate Court of Cook County denied the petition to remove him but ordered Feigenholtz to post an $800,000. bond with surety pursuant to an Illinois statute, Chapter 3, Illinois Revised Statutes 1961 par. 150, permitting the court to require surety when a will waives such when the court "from its own knowledge or the suggestion from any interested person has cause to suspect him of fraud or incompetence or believes the estate of decedent will not be sufficient to discharge all the claims against the estate."

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* Chap. 3, Ill. Rev. Stat. 1961, par. 276 (Amended in 1965 to provide as a ground for removal: "other good cause.")

The Probate Court ordered Feigenholtz to inventory and account for the appointive property and disapproved his executor's account as amended.

Feigenholtz appealed from all parts of the order except that denying the petition for removal.

The Supreme Court of Illinois, *In Re Estate of Breault,* 29 Ill.2d 165, held that the purported will did not undertake to make the appointive property available for the payment of Oscar's debts and administration expenses (29 Ill.2d 165, 176), that the purported will did not manifest an intention to appoint Kathryn's trust property to Oscar's estate, and reversed that part of the Probate Court order requiring Feigenholtz as executor to inventory and account for the Kathryn Breault trust assets and to post an additional $800,000. bond with surety. (29 Ill.2d 165, 178).

The Supreme Court affirmed the disapproval of the accounting by Feigenholtz as executor (29 Ill.2d 165, 179) but recognized that the Probate Court of Cook County,* as it was then constituted had no equity jurisdiction to require an accounting from the inception of the trust, saying, however, that petitioners herein "are not without a remedy or tribunal to pursue such claims should they so desire." (29 Ill.2d 165, 180).

G. THE SUIT FOR DECLARATORY JUDGMENT AND ACCOUNTING.

Thereafter, in December 1963, petitioners filed an amended complaint in the instant case, which is a second diversity suit in the United States District Court for

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* Said Court became the Probate Division of the Circuit Court of Cook County on January 1, 1964.

the Northern District of Illinois, seeking in Count I a declaratory judgment with respect to the validity under the Rule Against Perpetuities of Kathryn's gift to the three charities, "if such will shall not be admitted to probate," the rights of the three charities to attack collaterally the order admitting the will to probate and the validity of the trust in Oscar's contested will. (App. 22-32, App. A., *infra*, page 6a).

Count II of the Amended Complaint was intended to seek an accounting from Feigenholtz and Dahm from the inception of the trust (App. 32-38; See *In re Estate of Breault*, 63 Ill.App.2d 246, 261).

The district judge ordered that a responsive pleading to Count II be deferred until further order of the court (App. 7-8) and none was ever filed.

The cause was tried as to Count I on a stipulation of facts by the Court without a jury (App. 73-101).

H. THE SETTLEMENT AGREEMENT.

Thereafter, before any decision and after repeated urgings by the district judge (Transcript of Proceedings, Feb. 2, 1965 pp. 6-7; Feb. 23, 1965) petitioners, on March 29, 1965, filed a settlement agreement, which had been entered into as of March 24, 1965, among them claiming interests as Kathryn's and Oscar's heirs; Estelle, Kenneth and Wesley Memorial Hospital named as beneficiaries in Oscar's will; and the three charities named in Kathryn's will, being all the parties claiming any beneficial interest in the estates of Kathryn and Oscar as heirs, legatees or beneficiaries. (App. 102-111).

Upon the objection of Feigenholtz, Dahm and Busch (App. 115) to the petition for the approval of the settlement agreement (App. 111) the district judge denied

the petition for the stated reason that "the Court does not have jurisdiction to destroy a spendthrift trust." (App. 121).

The district judge said that the settlement agreement is "an excellent one and if it didn't affect the spendthrift trust, I would not have any hesitancy to approve it, because I think it reflects a lot of progress, except I just cannot, in my legal conscience, approve it, knowing that there is no justification for it in the law and, as anxious as I am to work these things out, I am a lawyer first and at least I have to call them as I see them." (Transcript of Proceedings, April 22, 1965, page 19). As an alternative, he proposed a settlement which would give the three charities and Wesley Hospital the amounts provided for in the settlement agreement but would retain Feigenholtz as trustee, who could "distribute the net income of that trust estate to Estelle and the three children in accordance with any agreement they can make * * * without doing any violence to the spendthrift trust." He proposed the creation of two additional directors for the corporation permitting the petitioners to select one, Kenneth and Estelle the other (Transcript of Proceedings, April 22, 1965 pages 5-7).

I. THE DECISION ON THE MERITS.

On June 1, 1965, the district judge filed his written memorandum opinion incorporating findings of fact and conclusions of law (App. 13, 121, 350 F. Supp. 551). A decree based on the memorandum opinion was entered on July 1, 1965 (App. 14, 142).

In his opinion, the district judge said, "If the plaintiff's have no interest in their grandmother's estate and if they can establish none even if Oscar's will is declared

invalid, they have no right to relief sought under Count II, nor indeed could this court entertain 60 C 1060 [the Will Contest] should Oscar's probate estate be shown to be worth less than $10,000." (App. 123, 250 F.Supp. 551, 553).

The district judge sustained the provisions in Kathryn's will and in Oscar's contested will and held that should petitioners prevail in the will contest, the Kathryn Breault trust estate would pass to the three charities named in her will. Although no pleadings had been filed with reference to Count II, the district judge on his own motion ordered that Count dismissed. (App. 145).

J. THE DECISION OF THE COURT OF APPEALS.

Petitioners appealed to the United States Court of Appeals for the Seventh Circuit urging the following points:

1. The District Judge erred or abused his discretion in refusing to approve the settlement agreement.
2. The District Judge erred in holding that plaintiffs have no interest in their grandmother's trust estate.
3. The District Judge erred in dismissing the count seeking an accounting.

Estelle Breault, Kenneth Breault, St. Hedwig Industrial School for Girls and Polish Manual Training School for Boys each sought to adopt petitioner's Point 1. Not having appealed, however, the court denied them leave to adopt Point 1 without prejudice to their right as appellees to confess error. Subsequently, Estelle and Kenneth filed Confessions of Error as to Point 1 and Estelle, Kenneth, St. Hedwig Industrial School for Girls and Polish Manual Training School for Boys sought to adopt portions of appellee's brief. Little Sisters of the

Poor, the third charity named in Kathryn's will filed no appearance as appellee.

The Court of Appeals affirmed. It held that the jurisdiction or authority of the federal court to approve the settlement agreement was controlled by *Altemeier* v. *Harris,* 403 Ill. 345, 86 N.E.2d 229, and that petitioners' reliance on *Wolf* v. *Uhlemann,* 325 Ill. 165, 156 N.E. 334, as controlling was misplaced. It said that in *Altemeier,* "the Court distinguished *Wolf* v. *Uhlemann,* 325 Ill. 165, 156 N.E. 334, and similar cases applying the family settlement doctrine with the observation that in those cases 'no spendthrift provisions [were] changed or set aside' (403 Ill. 345, 351)" (App. A, *infra,* p. 7a).

The fact is that both *Wolf* and *Altemeier* involved trusts for accumulation for the benefit of adults. *Altemeier* v. *Harris,* 335 Ill.App. 130, 132; *Altemeier* v. *Harris,* 403 Ill. 345, 351, and under Illinois decisions these are spendthrift trusts. *Bennett* v. *Bennett,* 217 Ill. 434, 442-443. *Commissioner of Internal Revenue* v. *Blair,* (CA 7) 60 F.2d 340; *Wagner* v. *Wagner,* 244 Ill. 101, 111; *Wallace* v. *Foxwell,* 250 Ill. 616, 627-629; *Altemeier* v. *Harris,* 403 Ill. 345, 352.

Altemeier did not distinguish *Wolf* v. *Uhlemann* in the manner recited by the court below. In *Altemeier* the Supreme Court referred to five Illinois cases involving simple wills with gifts directly to beneficiaries and in which no trusts were involved and said as to them, but not as to *Wolf* v. *Uhlemann* "It is observed that in every one of the cases just cited, wherein the family settlement doctrine is announced, no trust existed, and no contingent beneficiaries were interested, and no spendthrift provisions [were] changed or set aside." 403 Ill. 345, 351.

Wolf was in fact distinguished in *Altemeier* in the following manner:

> "In the case of *Wolf* v. *Uhlemann,* 325 Ill. 165, while a trust for accumulation was created by the will, yet the court reached its conclusion largely by reason of the extremely doubtful meaning of the will and the threatened litigation, together with a unanimous agreement to a family settlement. There was no discussion of the power to terminate a spendthrift trust or of the effect of a family agreement on contingent interests." 403 Ill. 345, 351.

In *Altemeier,* a family settlement patterned after the settlement approved in *Wolf,* was held invalid for the reason that there was no genuine controversy. The will had been sustained in a will contest terminated forty years earlier. The trust had been fully construed and validated by a decision of the Supreme Court of Illinois in *Smith* v. *Thomas,* 317 Ill. 150, twenty-four years earlier. It was held in *Altemeier* that the former decree was *res adjudicata* and binding on all of the parties to the so-called settlement agreement. *Altemeier* v. *Harris,* 335 Ill.App. 130, 153-154; *Altemeier* v. *Harris,* 403 Ill. 345, 354, 356-357. See Bogert, *Trusts* and *Trustees,* 2nd Ed. 1962, §1,009, p. 571 and James, *Illinois Probate Law and Practice,* 1951, §11.17, p. 101.

The Supreme Court affirmed the holding of the Appellate Court that there was no genuine controversy to be settled, but it also considered the question whether in the absence of such genuine controversy, the *sine qua non* of the family settlement doctrine, there could be a settlement. It followed the well-established rule announced in *Wolf,* 325 Ill. 165, 183, that the beneficiaries of a valid, uncontested spendthrift trust may not abrogate it merely for their own convenience. (403 Ill. 350-351)

The Court of Appeals said with reference to *Stein* v. *LaSalle National Bank,* 328 Ill.App. 3, 65 N.E.2d 216, that "many of the considerations the plaintiffs advance here were rejected." (App. A, *infra,* p. 8a).

In *Stein,* the court actually said at page 7:

> "Plaintiff and the guardian rely upon *Wolf* v. *Uhlemann,* 325 Ill. 165 to support their contention that the trial court had power to approve the settlement beneficial to the minors where all beneficiaries agree and only the trustee objects. The proceeding here is patterned after the one in that case. There, however, the court approved a compromise of threatened litigation between members of a family over a complex and involved will. In this case there is neither a family dispute nor a complex and involved will. There is no question, therefore, of subverting a trust to keep a family from being torn asunder. *Anderson* v. *Anderson,* 380 Ill. 488."

The Court of Appeals said with reference to *Thorne* v. *Continental Illinois National Bank & Trust Company,* 18 Ill.App.2d 163, 151 N.E.2d 398: "The spendthrift trust clauses were not struck down or destroyed. There was but an invasion of the corpus for settlement purposes, compatible with *Altemeier.*" (App. A, *infra,* p. 8a)

The settlement in *Altemeier* would not have terminated the trust. *Altemeier* v. *Harris,* 335 Ill.App. 138, 140-145; 81 N.E.2d 22, 27-29.

In *Thorne,* the court said at p. 175: "We do not believe the fact that the trusts in question contained 'spendthrift clauses' * * * should limit a court of equity in its directing an invasion of the corpus, as no case cited, which permitted deviation from trust provisions, indicated that spendthrift clauses are to be considered in any different category than other trust provisions when permitting the deviation from the corpus restrictions."

In *Thorne,* three cases cited by the trustee-appellant were *Altemeier, Stein,* and *Tree.* (Appellant's Brief in *Stein.*)

With reference to *Tree* v. *Continental Illinois National Bank & Trust Company,* 346 Ill.App. 509, 105 N.E.2d 324, the Court of Appeals said: "Insofar as *Tree* indicates that such a trust could be abrogated under the family-settlement doctrine if there was substantial doubt as to its validity, it appears to be inconsistent with the rationale of *Altemeier* and must be rejected as out of harmony with the controlling Illinois Supreme Court precedent." (App. A, *infra,* p. 9a).

In *Tree,* the Illinois Appellate Court made a statement of the issue before it as follows: (p. 520):

> "If the trust provisions in the instant will violate the Rule of Perpetuities, or if there is substantial doubt as to its validity, then there is merit in plaintiffs' position that the instant family settlement agreement, which the law favors (*Stepanowich* v. *Sleeth,* 349 Ill. 98, *Wolf* v. *Uhlemann,* supra), should be confirmed. On the other hand, if there is no such substantial doubt as to its validity, then the same objection applies, as stated by the Appellate Court in *Altemeier* v. *Harris, supra,* p. 154), and affirmed by the Supreme Court: 'If the Family Settlement Agreement here is approved and validated the effect would be that the members of the Stover family would be privileged to alter the terms and provisions of their ancestor's will merely for their own convenience and in order to secure greater individual financial advantages than those provided in the will and intended by the testator.' "

The Court of Appeals did not discuss other authorities cited by petitioners: Griswold, *Spendthrift Trusts,* 2nd Ed. 1947, §522, p. 600; 3 *Scott, Trusts,* 2nd Ed. 1956, §337.6, p. 2466; *Restatement of the Law of Trusts,* 2nd Ed. 1959, §337, comment o, p. 166; 2 *Page on Wills, Bowe-*

Parker Revision (1960) §25.5, p. 632; *In the Matter of the Estate of Dutton,* 347 Mich. 186, 79 N.W.2d 608; *Charlotte B. Quigley,* 1 Tax Court 831 (Rev. on other grounds. (C.A. 7th) 143 F.2d 27).

The Court of Appeals said, "Moreover, it is not without significance that the only doubts as to validity in the instant case are raised by the beneficiaries who seek to terminate the spendthrift trust by unanimous consent by invoking the family-settlement doctrine for the self-serving purpose of solving the controversy they have created." (App.A, *infra,* p. 8a).

In Illinois, as elsewhere, when a fiduciary relation exists between the testator and a trustee who is given very large discretionary powers as executor and trustee, including the control over a corporation and the power to determine his own salary, when the testator is the dependent and the executor-trustee, the dominant party, and the testator therefore reposes trust and confidence in the executor and trustee as in the ordinary relation of attorney and client, when the will is written or its preparation procured by that executor and trustee, proof of these facts establishes *prima facie* the charge that the execution of the will was the result of undue influence exercised by that executor-trustee and this proof standing alone and undisputed by other proofs entitles a contestant to a verdict. *Harrison* v. *City National Bank,* 210 F.Supp. 362; *Peyton* v. *William C. Peyton Corp.,* 23 Del. Chancery 321, 7 Atl. 2d 737, 123 ALR 1482, 1505; *In Re Lobb's Will,* 173 Ore. 414, 145 Pac. 2d 808; *Abbott* v. *Church,* 288 Ill. 91, 123 N.E. 306; *Gum* v. *Reep,* 275 Ill. 503, 114 N.E. 271; *Teter* v. *Spooner,* 279 Ill. 39, 116 N.E. 673; *Compher* v. *Browning,* 219 Ill. 429, 76 N.E. 678.

Petitioners are not claiming interests as beneficiaries of the spendthrift trust that Oscar's will, if valid, would create; they are claiming as heirs of their grandmother

and father and are contesting the validity of the will which would create the spendthrift trust. The three charities are not beneficiaries under the purported will; they are parties to the declaratory judgment action because Feigenholtz claims that if petitioners win the will contest, Kathryn's trust estate would descend to the charities, that Oscar's estate is insolvent (in the absence of any accounting) and that the amount in controversy does not exceed $10,000. Wesley Hospital is a contingent remainderman under Oscar's purported will that takes nothing, if the will is held invalid. Kenneth except for defending the will is in the same position as petitioners and is so treated in the settlement agreement. Estelle who is given one-third of the income under the settlement agreement but in any event not less than $12,000. a year for sixteen years testified that she has received nothing by way of income for the past several years and "there is nothing left." (App. 36).

On the merits of the declaratory judgment, (Count I) the Court of Appeals held that the provision in Kathryn's will, that if Oscar "shall fail to execute a Will, or if such Will shall not be admitted to probate, I hereby direct distribution" to three named charities, created a vested remainder in the three charities subject to the condition subsequent divesting the remainder if and whenever a will executed by Oscar and admitted to probate be sustained in a will contest and that the rule against perpetuities was not violated. (App.A., *infra*, pp. 9a-10a).

The court citing *Sternberg* v. *St. Louis Union Trust Company*, 394 Ill. 452, 459 held that the order admitting the will to probate (a jurisdictional prerequisite to a will contest and which establishes the will against collateral

attack) has no force or effect in a will contest. (App. A., *infra,* page 10a).

The court held that the provisions in Oscar's purported will directed distribution to three named children, not to a class and that the possibility of Oscar being survived by a posthumous child did not "precipitate" a violation of the Rule Against Perpetuities. (App. A., *infra,* page 11a)

The court did not discuss the following provision of the contested will: "In the event one of my beloved children predeceases me, or dies prior to the distribution of the Trust Estate, then and in that event, his or her portion of the income or principal of the Trust Estate shall be then divided among my remaining children." (App. 54).

The Court of Appeals held that the failure of the will to provide for any distribution in the event one surviving child attains the age of 40 but the youngest surviving child does not did not render the trust void for uncertainty. (App. A, *infra,* page 11a).

The Court of Appeals held that "the plaintiffs sought no accounting to Oscar's Estate" and that the trial court's declaration of rights adverse to plaintiffs' claim to the trust property as heirs of Kathryn and Oscar required dismissal of Count II of plaintiffs' complaint saying "Plaintiff's have no right to the accounting sought therein." (App. A., *infra,* page 12a).

K. THE INTERVENING DECISION OF THE ILLINOIS APPELLATE COURT.

In the meantime, Feigenholtz's attorney sought from the Probate Division of the Circuit Court of Cook County a partial allowance of fees earned in defending the will contest, the declaratory judgment proceedings, and the removal proceedings and in prosecuting his appeal to the

Supreme Court of Illinois from the order disapproving his account. The Probate Division allowed the Executor's attorney $45,000. on account and ordered Kathryn's trustees to pay such amount to him out of Kathryn's trust estate and to take credit for this in their accounts. Petitioners herein appealed from that order to the Appellate Court of Illinois, which, while the appeal below was pending, affirmed. *In Re Estate of Breault*, 63 Ill. App. 2d 246.

The Appellate Court after reviewing the proceedings in the Supreme Court said, "We assume, from the record before us, that respondents [petitioners herein] thereafter amended their federal action for declaratory judgment and accounting accordingly, because the amended Count II thereof filed after 29 Ill. 2d 165 seeks, in their behalf, such complete accounting." 63 Ill. App. 2d 246, 261.

In answer to the argument that an allowance of fees to the Executor's attorney out of Kathryn's trust estate was premature in that the declaratory judgment action contesting the validity of Oscar's appointment and the will contest contesting the validity of the will making the appointment were pending in the Federal Court, the Appellate Court said, at 63 Ill. App. 2d 246, 266:

> "Even if it should be eventually determined that the appointment was in fact defective, and the takers in default of the power of appointment are determined, the rule giving creditors of the donee's estate preference to the appointees, gives them preference to those takers after a defective appointment."

The Appellate Court quoted with approval from *Gilman* v. *Bell*, 99 Ill. 144, in which it was said, "where there has been a defective execution, the court will supply the defective execution of the power in favor of a purchaser, creditor, wife or child." 63 Ill. App. 2d 246, 264-265.

L. THE PETITION FOR REHEARING.

A petition for rehearing and a petition for rehearing *en banc* were filed in the Court of Appeals on March 8, 1966 and were denied on April 13, 1966 (Appendix C and D, *infra,* page 14a-15a).

VII.

REASONS FOR GRANTING THE WRIT.

The Court of Appeals has decided an important state question in a way in conflict with applicable State law and has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such as departure by a lower court, as to call for an exercise of this Court's power of supervision.

Diversity jurisdiction is a device expressly designed to achieve "equal justice under law." In *Guaranty Trust Company of New York* v. *York,* 326 U.S. 99, 111-112, this Court said:

> "Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias. The Framers of the Constitution, according to Marshall entertained 'apprehensions' lest distant suitors be subjected to local bias in State courts, or, at least, viewed with 'indulgence the possible fears and apprehensions' of such suitors. *Bank of the United States* v. *Deveaux,* 5 Cranch 61, 87, 3 L. Ed. 38.
> And so Congress afforded out-of-state litigants another tribunal, not another body of law."

This Court also said in that case at page 105, "* * * Congress never gave, nor did the federal courts ever claim the power to deny substantive rights created by State law * * *."

More than twenty-five years ago, this Court rendered a series of decisions intended to implement the Rules of Decision Act: *Fidelity Union Trust Company,* et al v. *Field,* 311 U.S. 169; *Six Companies of California,* et al v. *Joint Highway District,* 311 U.S. 180; *West* v. *American Telephone and Telegraph Company,* 311 U.S. 223; *Stoner* v. *New York Life Insurance Company,* 311 U.S. 464; *Vandenbark* v. *Owens Illinois Glass Company,* 311 U.S. 538.

Since then, however, this Court has rarely taken a diversity case on the asserted ground that a court of appeals misapplied applicable State law. Cf: *King* v. *Order of United Commercial Travelers,* 333 U.S. 153. See, Stern and Gressman, *Supreme Court Practice,* 3rd Edition 1962, pp. 134-135.

It is understandable that this Court ordinarily places its confidence in the Courts of Appeal for interpretation of the law of a State in a circuit. *Hillsborough Tp.* v. *Cromwell,* 326 U.S. 620; *Spiegel's Estate* v. *Commissioner of Internal Revenue,* 335 U.S. 701, 707-708. This Court might even regard a federal court decision misinterpreting State law as merely episodic in that such decisions are not binding on State courts in cases involving *other parties.*

We urge, however, that in this case the decision below was plainly wrong and special reasons call for review. Occasional review of the manner in which courts of appeal apply the Rules of Decision Act is manifestly important in furtherance of the principles of equal justice under law. The Framers intended to further this principle by giving federal courts diversity power under Article III, Section 2 of the Constitution. Congress intended to further this principle by the Rules of Decision Act. 28 U.S.C. § 1652. This Court intended to further such principle in

Erie R. Company v. *Tompkins*, 304 U. S. 64, 74-76. In recognition of the principle this Court announces in paragraph 1(b) of its Rule 19 that among the matters that it considers of sufficient weight in granting certiorari are those in which a court of appeals has decided an important state question in a way in conflict with applicable State law.

We submit that a consistent refusal by this Court to review such cases can only tend to make courts of appeal lax in their efforts to interpret correctly State law. This is one area that these courts know is not likely to be subject to review. Non-residents who choose a federal forum to avoid local bias may in fact find that they have sadly erred; they may be far better off looking to State courts which must consider that their decisions will affect resident citizens too. A discrimination not previously considered is inherent in this case.

This case presents an apt vehicle for the re-examination of the manner in which federal courts are meeting their obligation to follow applicable State decisions. First, the power of a court of equity to settle *bona fide* controversies has heretofore been regarded as "well-established" in Illinois and elsewhere. The settlement of a will contests is favored by all courts. 42 ALR 2d 1319. To limit such power when the challenged instrument contains spendthrift provisions does violence to the principle, unsettles titles, and ham strings courts in disposing of complex litigation. James, *Illinois Probate Law & Practice*, 1951, § 11.17, p. 101. *Page on Wills*, Bowe-Parker Rev. (1960) § 25.5 p. 632.

Second, the failure of the court below to follow applicable Illinois decisions is exceptionally clear. See Bogert, *Trusts and Trustees*, 2nd Ed. 1962, § 1009, p. 571, James,

Illinois Law and Practice, 1951, § 11.17, p. 101; Statement of the Case, *supra*, pp. 16-22; Petition for Rehearing, pp. 2-17; Appellant's Brief in the Court of Appeals, pp. 26-36.

In short: *Wolf* v. *Uhlemann*, 325 Ill. 165, 183, announces the familiar general rule that "the members of a family are not privileged to alter the terms and provisions of a will *merely* for the convenience of the family or for the *sole* purpose of securing greater individual financial advantages than those specified in the will and intended by the testator." (Italics ours)

But *Wolf* also announces a second "well-established" rule that "courts of equity favor the settlement of disputes among members of a family by agreement rather than by resort to law. Where there is a reasonable or substantial basis for the belief or assurance that prolonged and expensive litigation will result over the proceeds or distribution of an estate, that the estate will be materially depleted and that the family relationship will be torn asunder, the parties interested therein are warranted in preventing such bona fide family controversy by a settlement agreement." 325 Ill. 165, 183. In such event, abrogation of the trust is not *merely* for the convenience of the beneficiaries.

In *Altemeier* v. *Harris*, 403 Ill. 345, the so-called family settlement did not meet the requirements of the second rule, which, however, was expressly recognized. Likewise in *Stein* v. *Continental Illinois National Bank & Trust Company*, 328 Ill. App. 3, 7, and in *Tree* v. *Continental Illinois National Bank & Trust Company*, 346 Ill. App. 509. (opinions rendered after Altemeier) the requisite substantial controversy was lacking; however the rule was clearly recognized and such cases must be followed by the federal courts. *Stoner* v. *New York Life Ins. Co.*, 311

U.S. 464; *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 237; *Fidelity Union Trust Co.* et al v. *Field*, 311 U. S. 169, 177-178.

In *Thorne* v. *Continental Illinois National Bank and Trust Company*, 18 Ill. App. 2d 163, 175-176, the court said: "* * * no case cited, which permitted deviation from trust provisions, indicated that spendthrift clauses are to be considered in a different category than other trust provisions when permitting the deviation from the corpus restriction." In the Appellant's Brief in *Thorne* the trustee cited, *Altemeier*, *Tree* and *Stein*. In *Quigley*, 1 Tax Ct. 837, reversed on other grounds, C.A. 7, 1944, 143 F. 2d 27, the Tax Court said with respect to an Illinois family settlement: "The trusts certainly are no more impregnable than the will by which they were established."

In the instant case, the genuineness of the controversy cannot be seriously controverted. No lawyer claiming to have some expertise in the future interests field can read the district court's opinion, (App. 121, *In re Estate of Breault*, 250 F. Supp. 551) without having serious qualms about its correctness. Among other things it undertakes to water down the Rule Against Perpetuities in Illinois by a plain misinterpretation of *Monarski* v. *Greb*, 407 Ill. 281, App. 141. There the Supreme Court actually recognized the rule; it has vitality today. *Continental Illinois National Bank* v. *Llewellyn*, 67 Ill. App. 2d 171, 193-194. (January 1966). The Court of Appeals opinion undertakes to rewrite Kathryn's will to create a "vested remainder" out of what is clearly an executory devise. *Calvert* v. *Calvert*, 297 Ill. 22, 25-26; Carey & Schuyler, *Illinois Law of Future Interests*, 1941, §8, pp. 27-29; §11, p. 43; §299, p. 412.

But even if the declaratory judgment proceeding raised no substantial doubts about the validity of Kathryn's and

Oscar's wills, nevertheless the will contest is still at issue and untried. The facts that Oscar's purported will was drawn in Feigenholtz's law office when the latter occupied a dominant, fiduciary relationship towards Oscar, that Oscar was dependent on Kathryn's trust for whatever income he received, that Oscar had testified that he understood that whatever he received was a matter of the trustees' discretion, that Kathryn's will provided that the trustees had the power to terminate the trust and deliver the entire corpus to Oscar when the trustees "feel" that Oscar "has become competent to personally handle the corpus of this Trust", that the trustees did not deliver the corpus to Oscar, that Oscar's purported will gives Feigenholtz unlimited discretionary powers and permits him to continue to enjoy substantial income as president and counsel of the trust-owned company for which he has never accounted, show the substantial nature of the undue influence charges. There is a genuine controversy with respect to the validity of Oscar's contested will.

We add that Feigenholtz is an attorney and member of the bar of Illinois. Counsel herein are well aware that "it is highly improper for counsel on appeal to make groundless charges against fellow members of the bar and officers of the court." *United States* v. *Abrams,* C. A. 2, 1966, 357 F. 2d, 539, 551.

Third, it is not unreasonable that petitioners fear that local bias affected the interpretation of Illinois decisions by the court below.

This case involves an attempt in Illinois by Kentucky residents to bring a Chicago lawyer, well-known to the bench and bar of Illinois, to account for alleged derelictions as a trustee. But the opinion of the court below refers to

petitioners' efforts to settle the controversy with the beneficially interested parties as "for the *self-serving* purpose of solving the controversy *they* have created." (App. A, infra, p. 8a) (Italics ours)

The courts below block the efforts of the beneficially interested parties to terminate prolonged and expensive litigation by any settlement which does not maintain Feigenholtz as trustee in control of the trust and company from which he pays himself salaries, counsel fees and bonuses.

Petitioners have long sought an accounting to Oscar's estate from the inception of the trust. They claim a right to income which should have been paid to Oscar in his lifetime as Oscar's descendants entitled to their share of his estate. The Supreme Court of Illinois has held that petitioners have a remedy to compel an accounting from the inception of the trust. *In re Estate of Breault,* 29 Ill. 2d 165, 180. The Appellate Court of Illinois with Count II before it, has construed it as seeking such relief. *In re Estate of Breault,* 63 Ill. App. 2d 246, 261. But the court below affirms the dismissal of the accounting count, saying without factual basis: "The plaintiffs sought no accounting to Oscar's estate * * *" (App. A, *infra,* p. 11a) At the very least petitioners should have been given leave to amend if there was any doubt as to the relief sought.

The court below holds that should petitioners prevail in the will contest, the Kathryn Breault trust estate will descend to three charities named in her will. It is noteworthy that the court below does not give the three charities the right collaterally to attack the order admitting the will to probate or to file a will contest in their own behalf. They are given no rights to control the litigation. The effect of the holding is merely to support Feigen-

holtz' contention that Oscar's personal estate is insolvent [in the absence of an accounting], that petitioners, if successful, in the will contest can acquire no interest in Kathryn's estate and thus the will contest should be dismissed for want of jurisdictional amount.

It would not be unreasonable for petitioners to believe that Feigenholtz is being given undue protection and that they as children of Oscar Breault, grandchildren of Kathryn Breault, are considered outlanders, impertinent in their prolonged quest to bring a local lawyer to account.

We earnestly urge this Court to give more than "scant consideration" (See Stern and Gressman, *Supreme Court Practice,* 3rd Ed., 1962, p. 134) to this petition. An occasional review of the practical application by a federal court of the Rule in *Erie R. Company* v. *Tompkins,* and the Rules of Decisions Act would have a greatly needed therapeutic effect upon the administration of justice in the Northern District of Illinois and in the Seventh Circuit.

Respectfully submitted,

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APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1965 — JANUARY SESSION, 1966

No. 15301

WILLIAM JOSEPH BREAULT and BONNIE JO ELLEN KATHRYN BREAULT,
Plaintiffs-Appellants,
v.
HAROLD L. FEIGENHOLTZ and RICHARD DAHM, individually and as executors and trustees under the Last Will and Testament of Kathryn M. Breault, deceased; HAROLD L. FEIGENHOLTZ, as Trustee and EUGENE A. BUSCH, successor Trustee under the Last Will and Testament of Oscar J. Breault, deceased,
Defendants-Appellees.

IRMA MEYERS; LITTLE SISTERS OF THE POOR OF CHICAGO; ST. HEDWIG INDUSTRIAL SCHOOL FOR GIRLS; POLISH MANUAL TRAINING SCHOOL FOR BOYS; ESTELLE ANGELA BREAULT; KENNETH BREAULT and WESLEY MEMORIAL HOSPITAL, a corporation, *Defendants.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

FEBRUARY 21, 1966

Before SCHNACKENBERG and CASTLE, *Circuit Judges,* and GRUBB, *Senior District Judge.*

CASTLE, *Circuit Judge.* William Joseph Breault and Bonnie Jo Ellen Kathryn Breault, the plaintiffs-appellants, brought this diversity action in the District Court seeking a declaratory judgment as to their rights as heirs of their grandmother, Kathryn M. Breault, deceased and as heirs of their father, Oscar J. Breault, deceased, whose will they were contesting in an earlier filed and pending diversity action. Plaintiffs also sought an accounting, based on such declaration of rights, from the defendants-appellees, Harold L. Feigenholtz and Richard Dahm, the executors and trustees under the will of Kathryn, with respect to the assets and income of Brolite Company, the stock of which was owned by Kathryn and was part of the corpus of a testamentary trust created by Kathryn's will.

Other defendants-appellees are Feigenholtz as executor and as trustee, and Eugene A. Busch as successor trustee, under the will of Oscar J. Breault. Additional defendants include Oscar's widow, Estelle Angela Breault, Oscar's son by his first wife, Kenneth Breault, and certain charities named in the wills.

The cause was tried as to Count I, which seeks the declaratory relief, on a stipulation of facts, by the Court without a jury.

While the matter was under advisement all of the beneficially interested defendants entered into a settlement agreement with respect to the declaratory judgment action and the related will contest. Plaintiff's petition for approval of the settlement agreement was objected to by the defendant-appellee executors and trustees and was denied by the court on the basis of lack of jurisdiction or authority to terminate the spendthrift trust of which plaintiffs were the beneficiaries under the purported will of Oscar.

Thereafter the court filed a memorandum opinion incorporating its findings of fact and conclusions of law and entered a judgment order decreeing and declaring, in ef-

fect, that the trust provisions of the purported will of Oscar were valid; that irrespective of the validity of the probated instrument as the will of Oscar (it being under attack in the pending will contest action as the product of undue influence on the part of Feigenholtz) plaintiffs are entitled to nothing as heirs of Kathryn; and in view of this conclusion dismissing Count II on the ground plaintiffs had no right to the accounting sought therein.

Plaintiffs appealed and assert that the court erred in refusing to approve the settlement agreement, in the declaration of rights made, and in denying plaintiffs the accounting they sought.

Kathryn M. Breault died testate on August 3, 1952. At the time of her death her only heir-at-law was her son, Oscar J. Breault, who was then married to Florence B. Breault. The plaintiffs-appellants are children of the marriage of Oscar and Florence. Defendant Kenneth Breault is a son of Oscar by a prior marriage. Subsequent to Kathryn's death Oscar and Florence were divorced. Oscar then married Estelle Angela Breault.

Kathryn's will, after a specific legacy to Irma Meyers, which has been paid and with respect to which no question is involved herein, gave the very substantial residue of her estate to defendants-appellees Feigenholtz and Dahm as her testamentary trustees. The will created a spendthrift trust for the benefit of Oscar and provided that he should receive the net income from the trust estate quarter annually during his lifetime. The will further provided:

> "Upon the death of my son, Oscar J. Breault, the property of the Trust Estate shall be distributed according to the provisions and terms of the Last Will and Testament of my said son, Oscar J. Breault, and if he shall fail to execute a Will, or if such Will shall not be admitted to probate, I hereby direct distribution of the said Trust Estate in the following manner:
>
> One-third (⅓) thereof to the Little Sisters of The Poor of Chicago.

One-third (⅓) thereof to the St. Hedwig Industrial School for Girls, 7135 N. Harlem Avenue, Niles, Illinois.

One-third (⅓) thereof to the Polish Manual Training School For Boys, 7135 No. Harlem Avenue, Niles, Illinois."

Oscar died on July 16, 1959. In the instrument admitted to probate as his last will and testament, but which is the subject of the will contest action pending in the District Court, defendant-appellee Feigenholtz was named as executor, and after a direction that debts and taxes be first paid, the rest, residue and remainder of the testator's property belonging to him at the time of his death "or over which I have the power of disposition" was given to Feigenholtz, and his successor or successors, as testamentary trustee with direction to pay the net income from the trust estate to the testator's wife, Estelle Angela Breault, for and during her lifetime. It was further provided:

"(c) Upon the death of my wife the Trustee shall distribute the net income from the Trust Estate to my beloved children, Kenneth Breault, William Joseph Breault and Bonnie Catherine Breault, in equal installments not less frequently than quarter-annually up to the time that the youngest of my surviving children shall have attained the age of forty (40) years.

(d) At the date that the youngest of my surviving children shall have attained the age of forty (40) years, the Trustee shall distribute the remaining principal of the Trust as follows:

1. To my beloved child, Kenneth Breault, five per cent (5%) of my trust estate.
2. To my beloved child, William Joseph Breault, five per cent (5%) of my Trust Estate.
3. To my beloved child, Bonnie Catherine Breault, five per cent (5%) of my Trust Estate.
4. To the Wesley Memorial Hospital, an eleemosynary institution, eighty-five per cent (85%) of my Trust Estate.

(e) In the event one of my beloved children predecease me, or dies prior to the distribution of the principal of the Trust Estate, then and in that event his or her portion of the income or principal of the Trust Estate shall be then divided among my remaining children.

(f) In the event all of my beloved children shall die prior to the age of forty (40) years, this Trust shall terminate and the entire principal and accumulations of the Trust shall be forthwith distributed to the Wesley Memorial Hospital, an eleemosynary institution.

(g) I hereby direct and provide that no part of the corpus of said Trust Estate hereinbefore created for the benefit of my three children, Kenneth Breault, William Joseph Breault and Bonnie Catherine Breault, shall ever be liable in any way for any debts that my said three children, Kenneth Breault, William Joseph Breault and Bonnie Catherine Breault, may at any time contract, or for any debts that they may have contracted, and shall never be liable for any other claim of any kind against them."

It is conceded that the provisions of the will for the benefit of Oscar's children, if valid, constitute a spendthrift trust. The payments and plan of distribution to be made under the proposed settlement agreement would terminate the spendthrift trust.

In related litigation, instituted on behalf of the plaintiffs-appellants, then minors, and culminating on appeal in a decision by the Illinois Supreme Court (*In re Estate of Oscar J. Breault,* 29 Ill. 2d 165) it was held that the provisions of Oscar's will exercising his testamentary power of appointment over the property in Kathryn's testamentary trust did not constitute such trust property a part of Oscar's estate but that the appointee takes from the estate of the donor, Kathryn. It was further held that Oscar's estate was entitled to an accounting from Kathryn's trustee for the period extending between the date of the last

trustee's report approved by Oscar in his lifetime, January 1, 1959, and the date of his death, July 16, 1959, and that in view of Feigenholtz's dual capacity the probate court properly appointed a special administrator to represent Oscar's estate for the purpose of receiving and participating in hearings upon such report.

Plaintiffs-appellants claim that the proposed settlement is not barred by the principle, recognized and followed by the Illinois courts, that the beneficiaries of a spendthrift trust may not by unanimous consent terminate the trust. They contend that such principle is inapplicable here because of the existence of a genuine controversy based on reasonable grounds both as to whether the instrument probated as the will of Oscar is invalid as the product of undue influence and as to the construction and validity of provisions of the wills of both Kathryn and Oscar.

On the merits, plaintiffs-appellants claim interests in the estates of Kathryn and Oscar as their heirs. In this connection they contend the District Court erred in rejecting their contentions that (a) Kathryn's gift to the three charities, "if such will shall not be admitted to probate," violates the rule against perpetuities; (b) in any event, upon the entry of the order admitting to probate the instrument executed by Oscar and purporting to be his will, any interest which the three charities may have had in Kathryn's will was extinguished, and the charities not having appealed from such order or contested the will within the statutory time are barred from asserting any interest in the trust estate; (c) the provisions of the instrument purporting to exercise the power of appointment and to create a spendthrift trust providing for its final distribution "when the youngest of my surviving children shall have attained the age of forty (40) years" when read into Kathryn's will violates the rule against perpetuities in that it was possible at Oscar's death for him to be survived by a posthumous child; and (d) the provisions of Oscar's purported will create an invalid trust in that the interests are uncertain and it is possible for the trust to continue in perpetuity. It is on the basis of these conten-

tions that plaintiffs claim there is intestacy with respect to the trust assets of Kathryn's estate remaining after Oscar's death and that plaintiffs are entitled to interests in Kathryn's trust estate and in the intestate estate of Oscar as heirs.

Plaintiffs-appellants claim to the accounting sought in Count II is predicated on their contention that they are entitled to interests in the trust assets and income derived therefrom as heirs of Kathryn and Oscar.

The District Court's refusal to approve the proposed settlement agreement is in our opinion fully supported by *Altemeier* v. *Harris*, 403 Ill. 345, 86 N.E. 2d 229. *Altemeier* involved a trust with "spendthrift provisions for the protection of the beneficiaries" (403 Ill. 345, 350 and 352). The family-settlement agreement there proposed made substantial changes in the disposition of the property and a spendthrift provision with respect to the support of the testator's grandchildren or their descendants was absolutely abrogated. The Illinois Supreme Court affirmed a reversal of the trial court's approval of the settlement. The court distinguished *Wolf* v. *Uhlemann,* 325 Ill. 165, 156 N.E. 334, and similar cases applying the family-settlement doctrine, with the observation that in those cases "no spendthrift provisions [were] changed or set aside" (403 Ill. 345, 351). Although analysis of *Altemeier* discloses that additional reasons were given for the result reached it is clear that the presence of an attempted termination and destruction of the spendthrift trust by the unanimous consent of the beneficiaries is a part of the *rationale* upon which the decision is based. In this connection it is stated (403 Ill. 345, 355) that:

> "We have thus enumerated a number of principles applicable to the will and the litigation in this case, because none of them were adverted to or mentioned in the family-settlement cases. Nor is there any indication, in the family-settlement cases, that, were the conditions thus enumerated present, the result would have been the same. In view of the foregoing, we are of the opinion that the object and purpose of a trust

> created by a will cannot be varied or terminated unless the purpose of the trust is accomplished, nor can such a trust be terminated by unanimous consent where it contains spendthrift provisions or where contingent interests cannot be definitely ascertained. All three of these conditions exist in the instant case."

and the court in concluding (403 Ill. 345, 357) said:

> "We are fully in accord with the decision of the Appellate Court that the appellants have not brought themselves into a position where they can take advantage of the family-settlement doctrine; . . ."

From the foregoing it is apparent that plaintiffs' reliance on *Wolf* v. *Uhlemann,* is misplaced. Other decisions cited by plaintiffs include *Stein* v. *LaSalle National Bank,* 328 Ill. App. 3, 65 N.E. 2d 216; *Thorne* v. *Continental National Bank & Trust Co.,* 18 Ill. App. 2d 163, 151 N.E. 2d 398; and *Tree* v. *Continental Illinois National Bank & Trust Co.,* 346 Ill. App. 509, 105 N.E. 2d 324. In *Stein* approval to terminate a spendthrift trust and make distribution was denied and many of the considerations the plaintiffs advance here were rejected. In *Thorne* the spendthrift trust clauses were not struck down or destroyed. There was but an invasion of the corpus for settlement purposes, compatible with *Altemeier.* In *Tree* the court reversed the trial court's approval of a family-settlement agreement terminating a spendthrift trust as being in violation of the *Altemeier* rule. Insofar as *Tree* indicates that such a trust could be abrogated under the family-settlement doctrine if there was substantial doubt as to its validity it appears to be inconsistent with the rationale of *Altemeier* and must be rejected as out of harmony with the controlling Illinois Supreme Court precedent. Moreover, it is not without significance that the only doubts as to validity in the instant case are raised by the beneficiaries who seek to terminate the spendthrift trust by unanimous consent by invoking the family-settlement doctrine for the self-serving purpose of solving the controversy they have created.

We conclude, on this phase of the appeal, that the District Court did not err in refusing to approve the proposed settlement agreement. We turn to consideration of the plaintiffs' contentions in support of their claim that the court erred in its declarations on the merits.

Kathryn devised and bequeathed the bulk of her estate to her trustees for the benefit of Oscar during his lifetime and bestowed upon him a general testamentary power of appointment and "if he shall fail to execute a will, or if such will shall not be admitted to probate" directed distribution of the trust estate in equal shares to three charities. We agree with the District Court's conclusion that the remainder to the charities was not contingent but was vested in the three charities upon Kathryn's death, subject to divestiture should Oscar effectively exercise the power of testamentary disposition granted him by Kathryn's will. In this connection *Harvard College* v. *Balch*, 171 Ill. 275, 49 N.E. 543, is a controlling Illinois precedent. In that case John Hancock died leaving a will giving one-fifth of his estate to a trustee for the benefit of his son, Franklin, for life, authorizing the trustee to pay Franklin such sums as the trustee deemed expedient, and bestowing upon Franklin the power to dispose of said portion by will, in the family. The will further provided that "if he shall not have disposed of the same by will", the trust property should be divided among the testator's other children, George, Charles, Elizabeth and Washington. Charles, to whom a remainder was given by this provision, died in the lifetime of Franklin, leaving a will devising the residue of Charles' estate to Harvard College. Franklin died intestate, without having received any of the principal portion of his father's estate. The question arose whether the remainder limited to Charles passed by the latter's will to Harvard College, and whether it was vested. The court held that the remainder vested subject to the power, and since the power was not executed, the remainder passed by Charles' will to Harvard College. The court pointed out (171 Ill. 275, 281-282) that:

> "There cannot be any doubt that the power in Franklin . . . did not prevent the vesting of the remainder . . . or render it contingent. . . ."
>
> • • • • • • • • • • •
>
> "If, under the provision of the will, the remainder would vest and the existence of the power would not render it contingent, the mere use of the word 'if' by the testator would not accomplish that result, and it cannot have any controlling effect."

And, a vested interest is not violative of the rule against perpetuities. *Mettler* v. *Warner,* 243 Ill. 600, 90 N.E. 1099.

The conditions in the instant case relating to the exercise of the power are conditions subsequent, not precedent, to the vesting of the remainder in the charities. This accords with the Illinois rule favoring the immediate vesting of estates and interests unless the testator has clearly manifested an opposite intention. *Murphy* v. *Westhoff,* 386 Ill. 136, 140; 53 N.E. 2d 931.

We perceive no merit in plaintiffs' contention that the order admitting Oscar's will to probate served to extinguish any interest of the charities named in Kathryn's will, and that their failure to appeal from that order or to contest the will bars them from asserting any right to an interest in the trust estate. It is obvious that the divestiture of the vested interests of the three charities named in Kathryn's will required an *operative* exercise of the testamentary power of appointment by Oscar. If his will is set aside no divestiture occurs. That the will has been admitted to probate is of no controlling import. Its validity is being contested. In a will contest, the order of probate has no force or effect. *Sternberg* v. *St. Louis Union Trust Co.,* 394 Ill. 452, 459; 68 N.E. 2d 892, 896.

Oscar's will after bequeathing the residue of his personal estate and Kathryn's trust estate to his testamentary trustee, directs that the net income be paid Estelle during her life, and upon her death in equal shares to his three named children until the youngest should reach 40 years of age, at which time the corpus is to be distributed to the

three named children (5% to each) and to a charity (85%). In the event all of the children die prior to the age of 40 the charity is to receive the entire corpus. All of the beneficiaries and distributees were in being at the time of Kathryn's death.[1] There could be no violation of the rule against perpetuities. *Tree* v. *Continental Illinois National Bank & Trust Co.*, 346 Ill. App. 509, 520, 521, 105 N.E. 2d 324. The will directs distribution to three specifically named children, and not to a class. The possibility of Oscar's being survived by a posthumous child does not serve to precipitate a violation of the rule against perpetuities.

Plaintiffs' argument that the exercise of the power contained in Oscar's will is invalid because of uncertainty is premised on its failure to make specific direction for disposition of the corpus in event Kenneth attains 40 and Bonnie, the youngest child, dies before 40, or in event Estelle, Kenneth, William and Bonnie should all die between the time when Kenneth attains the age of 40 and when Bonnie would attain the age of 40. In this connection plaintiffs rely upon the criteria as to certainty set forth in *Tucker* v. *Countryman*, 414 Ill. 215, 220-221; 111 N.E. 2d 101, as prerequisite to the creation of a valid testamentary trust. But *Cazel* v. *Cazel*, 22 Ill. 2d 339, 343-345; 175 N.E. 2d 403, 405-407, which distinguishes *Tucker*, demonstrates that the general criteria prescribed in *Tucker* is not violated by contingencies such as those to which plaintiffs allude. In *Cazel*, the court held that a will leaving the testator's property to a trustee until the youngest child of the life beneficiary attained 21, the life beneficiary having four living children aged 20, 18, 17, and 15, respectively, would not be declared uncertain, where all the testator's property was embraced in the trust, and properly described, where the identity of the beneficiaries was cer-

[1] The provisions made by Oscar, the donee of the power of appointment, are read back into the instrument creating the power. *Northern Trust Co.* v. *Porter*, 368 Ill. 256, 263, 13 N.E. 2d 487; *In re Estate of Breault*, 29 Ill. 2d 165, 174, 193 N.E. 2d 824.

tain, and where the nature of their interests was described. The court held that the possibility that contingencies might arise in the future which may render some of the trust provisions uncertain, and that the trustee may at some future time have to apply to a court of equity for a construction of some of the provisions, does not mean that the the trust is void for uncertainty. The court, quoting from *Orr v. Yates*, 209 Ill. 222, 238, pointed out:

> "The duration of the trust is now definite and may never become uncertain. Certainly, a court will not defeat the clearly expressed intention of a testator because a contingency may arise in the future which will render the trust uncertain."

The plaintiffs sought no accounting to Oscar's estate but sought an accounting with respect to the assets of Kathryn's trust, including any accretions and undistributed income, to themselves as "heirs" of Kathryn and Oscar. The trial court's declaration of rights, adverse to plaintiffs' claim to rights in the trust property as "heirs" of Kathryn and Oscar, and in which declaration we find no error, required dismissal of Count II of plaintiffs' complaint. Plaintiffs have no right to the accounting sought therein.

The judgment orders appealed from are affirmed.

AFFIRMED

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Monday, February 21, 1966

Before

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Kenneth P. Grubb, District Judge

WILLIAM JOSEPH BREAULT and BONNIE JO ELLEN KATHRYN BREAULT,
Plaintiffs-Appellants,
vs.
No. 15301
HAROLD L. FEIGENHOLTZ, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment orders of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Wednesday, April 13, 1966

Before

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Kenneth P. Grubb, District Judge

WILLIAM JOSEPH BREAULT, et al.,
Plaintiffs-Appellants,
vs.
No. 15301
HAROLD L. FEIGENHOLTZ,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered that the petition for a rehearing of this cause, filed by the plaintiffs-appellants herein be, and the same is hereby, DENIED.

APPENDIX D.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Wednesday, April 13, 1966

Before

Hon. John S. Hastings, Chief Judge
Hon. F. Ryan Duffy, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

WILLIAM JOSEPH BREAULT, et al.,
Plaintiffs-Appellants,
vs.
No. 15301
HAROLD L. FEIGENHOLTZ,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for a rehearing of this cause *en banc*, filed by the plaintiff-appellants herein, be, and the same is hereby DENIED.

APPENDIX E.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Monday, April 18, 1966

Before
Hon. Latham Castle, Circuit Judge.

WILLIAM JOSEPH BREAULT, et al.,
Plaintiffs-Appellants,
vs.
No. 15301
HAROLD L. FEIGENHOLTZ, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the motion and affidavit of counsel for plaintiffs-appellants,

It Is Hereby Ordered that the issuance of the mandate of this Court be stayed for a period of thirty (30) days pursuant to the provisions of Rule 28(b) of the Rules of this Court.

It Is Further Ordered that the certified record on appeal transmitted to this Court from the United States District Court for the Northern District of Illinois, Eastern Division, be certified and transmitted to the Supreme Court of the United States for use in connection with plaintiffs-Appellants' proposed petition for writ of certiorari; said record to be returned to the files of this Court when it has served its purpose.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Thursday, May 26, 1966

Before
Hon. Latham Castle, Circuit Judge

WILLIAM JOSEPH BREAULT, et al.,
Plaintiffs-Appellants,
vs.
HAROLD L. FEIGENHOLTZ, et al.,
Defendants-Appellees.

No. 15301

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the motion of counsel for plaintiffs-appellants,

It Is Ordered that the issuance of the mandate of this Court be stayed for an additional thirty (30) days pursuant to the provisions of Rule 28 of the Rules of this Court.

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No. 203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

WILLIAM JOSEPH BREAULT and
BONNIE JO ELLEN KATHRYN BREAULT,

Petitioners,

vs.

HAROLD L. FEIGENHOLTZ and RICHARD DAHM, individually and as Executors and Trustees under the Last Will and Testament of Kathryn M. Breault, deceased; HAROLD L. FEIGENHOLTZ, as Executor and Trustee under the Last Will and Testament of Oscar J. Breault, deceased; EUGENE A. BUSCH, as Successor-Trustee under the Last Will and Testament of Oscar J. Breault, deceased; and IRMA MEYERS, *Respondents,*

LITTLE SISTERS OF THE POOR OF CHICAGO; ST. HEDWIG INDUSTRIAL SCHOOL FOR GIRLS; POLISH MANUAL TRAINING SCHOOL FOR BOYS; ESTELLE ANGELA BREAULT; KENNETH BREAULT; and WESLEY MEMORIAL HOSPITAL, *Defendants.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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Counsel for Respondents, Harold L. Feigenholtz, as executor and trustee under the Last Will and Testament of Oscar J. Breault, deceased; Eugene A. Busch, as successor trustee under the Last Will and Testament of Oscar J. Breault, deceased; and Irma Meyers.

JACOB SHAMBERG,
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Chicago, Illinois, 60602.

Counsel for Respondents, Harold L. Feigenholtz and Richard Dahm, individually and as executors and trustees under the Last Will and Testament of Kathryn M. Breault, deceased.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 203

WILLIAM JOSEPH BREAULT and BONNIE JO ELLEN KATHRYN BREAULT,

Petitioners,

VS.

HAROLD L. FEIGENHOLTZ and RICHARD DAHM, individually and as Executors and Trustees under the Last Will and Testament of Kathryn M. Breault, deceased; HAROLD L. FEIGENHOLTZ, as Executor and Trustee under the Last Will and Testament of Oscar J. Breault, deceased; EUGENE A. BUSCH, as Successor-Trustee under the Last Will and Testament of Oscar J. Breault, deceased; and IRMA MEYERS, *Respondents,*

LITTLE SISTERS OF THE POOR OF CHICAGO; ST. HEDWIG INDUSTRIAL SCHOOL FOR GIRLS; POLISH MANUAL TRAINING SCHOOL FOR BOYS; ESTELLE ANGELA BREAULT; KENNETH BREAULT; and WESLEY MEMORIAL HOSPITAL, *Defendants.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

STATEMENT.

The petition for a writ of certiorari seeks to draw in question the propriety of a decision of the Court of Appeals for the Seventh Circuit affirming decretal orders

entered by the United States District Court for the Northern District of Illinois, Eastern Division, in a diversity case that involved solely questions of Illinois law, on the ground that Illinois decisions were misapplied.

Dissatisfied with the Court of Appeals judgment, petitioners filed a petition for a rehearing and for a rehearing *en banc,* which was unanimously denied.

This occurred against a background of other unrelenting and generally unsuccessful litigation on their part that commenced six years ago and shows no signs of exhaustion. *In re Estate of Breault,* 29 Ill. (2) 165, 193 N.E. (2) 824 (1963); *In re Estate of Breault,* 63 Ill. App. (2) 246, 211 N.E. (2) 424 (1965); *Breault* v. *Marovitz, Judge of the United States District Court,* mandamus, C.A. 7, No. 15155, (1965) unreported. (App. 142)

There are errors in the petition.

Count I of the amended complaint was tried on a stipulation of facts (App. 73-101). By order of the District Court, a responsive pleading to Count II was deferred until the further order of the court (App. 62). The petition for approval of the settlement agreement, filed long after the trial (App. 111-114), to which these respondents filed a number of objections (App. 115-120), was decided upon the ground that the court did not have jurisdiction to destroy a spendthrift trust (App. 121), although at the hearing, one of respondents' counsel offered to introduce evidence and argue in support of the other objections. The District Judge stated he did not think it would be necessary because he could not approve any settlement agreement that vitiated the spendthrift trust (Appellees' App. 9).

Petitioners' reference to the District Judge's remarks that but for the spendthrift trust provisions, he would have no hesitancy in approving the settlement agreement (Pet. for Cert. p. 14), should be construed in context, and should not be dignified as a ruling upon the other objections which he never reached.

Moreover, petitioners relate as facts matters not contained in the stipulation of facts. The third paragraph on p. 5 of the petition for certiorari; the last paragraph on p. 6 thereof; the first, second and third paragraphs on p. 7; the last paragraph on p. 10; the last sentence in the partial paragraph at the top of p. 21; parts of the first complete sentence on p. 29; the sentence on p. 29 that there is a genuine controversy as to the validity of Oscar's contested will, do not appear in the stipulation.

Page 2 of the petition for certiorari refers to Feigenholtz, an Illinois attorney, as "well known to the bench and bar of Illinois." There was no proof of that; and inasmuch as he is entitled to the presumption of character and fitness, the remark, standing alone, seems innocuous.

But when the words are modified by the statement that the petitioners are aware of the rule that "it is highly improper for counsel on appeal to make groundless charges against fellow members of the bar" (Pet. for Cert. p. 29), and when they are repeated in connection with bringing him to account for alleged derelictions as a trustee (Pet. for Cert. p. 29), the words in such a context, and in conjunction with petitioners' baseless criticism of the administration of justice by the federal courts in Chicago, and their belief that he was receiving "undue protection" and their "fear" of "local bias", add up to a prejudicial interference with his rights in this Court.

Throughout the extended litigation, Feigenholtz has been subjected to groundless charges by petitioners.

In Re Estate of Breault, 29 Ill. (2) 165, 180, 193 N.E. (2) 824, when they sought his removal as executor, the Court said:

> "* * * we see neither waste, wilfulness nor bad faith * * *".

Two years later, the Appellate Court of Illinois in *Re Estate of Breault,* 63 Ill. App. (2) 246, 258, 211 N.E. (2) 424, had occasion to say:

> "In the instant case there is no evidence of bad faith on the part of the executor."

ARGUMENT.

I.

The decision below was clearly correct.

1. Petitioners claim that *Wolf* v. *Uhlemann,* 325 Ill. 165, 156 N.E. 334 (1927) is controlling as to the validity of their proposed settlement, and that *Altemeier* v. *Harris,* 403 Ill. 345, 86 N.E. (2) 229 (1949) does not mean what it says.

But *Altemeier* expressly distinguished *Wolf* when the Court said (403 Ill. 345, 351):

> "It is to be observed that in every one of the cases just cited wherein the family-settlement doctrine is announced, * * * no spendthrift provisions (were) changed or set aside. * * * In the case of *Wolf* v. *Uhlemann,* 325 Ill. 165, 156 N.E. 334, while a trust for accumulation was created by the will, yet the court reached its conclusion largely by reason of the extremely doubtful meaning of the will. * * * There was no discussion of the power to terminate a spendthrift trust. * * *"

At p. 352 of *Altemeier,* the Court said:

> "Likewise, the rule is clear that a spendthrift trust may not be destroyed or terminated by the unanimous consent of the beneficiaries."

At. p. 353 of *Altemeier,* the Court said:

> "* * * the general family settlement rule has never been applied in this State where the result would be to permit the determination of a trust under the instances enumerated".

At p. 355:

> "In view of the foregoing, we are of the opinion that the object and purpose of a trust created by a will cannot be varied or terminated unless the purpose of the trust is accomplished, nor can such a trust be terminated by unanimous consent where it contains spendthrift provisions or where contingent interests cannot be definitely ascertained."

At p. 357:

> "We are fully in accord with the decision of the Appellate Court that the appellants have not brought themselves into a position where they can take advantage of the family settlement doctrine."

Reverting parenthetically to the Appellate Court decision to ascertain what it said that the Supreme Court of Illinois was in accord with, we find this (335 Ill. App. 130, 139, 81 N.E. (2) 22):

> "The fact that family settlements are favorites of the law in nowise changes the rules of law applicable to trusts. In our opinion this is not a case for the application of any of the rules of law pertaining to family settlements."

In disposing of the point that it is better for the parties to settle than to litigate for the sake of maintaining a spendthrift trust, a point which overlooks entirely the intent of the testator, the Supreme Court said in *Altemeier,* p. 357:

> "Merely because * * * the present interests of the * * * descendants would be materially benefited by the approval of the decree * * * presents no ground for unsettling the established principles of equity jurisdiction, which would undoubtedly occur were we to terminate the trust."

Altemeier was foreshadowed by earlier Illinois cases such as *Mohler* v. *Wesner*, 382 Ill. 225, 230, 47 N.E. (2) 64, 66; *Hartley* v. *Heirs of Wyatt*, 281 Ill. 321, 325, 117 N.E. 995, 997; *Stephens* v. *Collison*, 274 Ill. 389, 397, 398, 113 N.E. 691, 694; *Anderson* v. *Williams*, 262 Ill. 308, 315, 104 N.E. 659, 661; *Wood* v. *Gridley*, 217 Ill. App. 579, 586.

Illinois courts have gone farther than those of most states to uphold spendthrift trusts.

In *Stein* v. *La Salle Nat. Bk.*, 328 Ill. App. 3, 6, 65 N.E. (2) 216, decided before, and not after, *Altemeier*, as the petition for certiorari states, p. 27, the Court in an opinion by Mr. Justice Kiley said:

> "Courts of this State have been careful to protect the trust schemes of testators. * * * The United States Circuit Court of Appeals for the 7th District said in *Commissioner of Internal Revenue* v. *Blair*, 60 Fed. (2) 340, that Illinois courts have gone farther than those of most States to uphold spendthrift trusts."

Mr. Justice Kiley declined to follow *Wolf* for the reason, among others, that no family would be torn asunder by the litigation threatened there.

No family was being torn asunder in the case at bar. Years of bitter litigation while Oscar J. Breault was alive, had taken care of that. *In re Estate of Breault*, 29 Ill. (2) 165, 167, 193 N.E. (2) 824, 826.

District Judge Marovitz observed:

> "There has been no closeness in this family at all, none at all. They have been like total strangers." (Appellees' App. 10).

Following *Altemeier*, there were three pertinent Illinois Appellate Court decisions. *Tree* v. *Cont. Ill. Nat. Bk. & T. Co.*, 346 Ill. App. 509, 105 N.E. (2) 324 (1952); *Thorne* v.

Cont. Ill. Nat. Bk. & T. Co., 18 Ill. App. (2) 163, 151 N.E. (2) 398 (1958); *Guttman* v. *Schiller*, 39 Ill. App. (2) 58, 187 N.E. (2) 315 (1963).

In *Tree*, the Appellate Court, although it reversed the approval of a family settlement terminating a spendthrift trust, said that if there were a substantial basis for doubt as to the validity of the trust provisions, the family-settlement doctrine could apply. The court went on to hold there was no such doubt, and concluded with a quotation from *Altemeier* that a testamentary spendthrift trust could not be terminated by unanimous consent. Mr. Justice Kiley concurred.

The petition for approval of the settlement in the case at bar did not set forth that there was a substantial basis for doubt. (App. 111-114)

Thorne and *Guttman* were decided by different divisions of the Illinois Appellate Court, and embraced without the reservation mentioned in *Tree*, the holding of *Altemeier*. In *Thorne*, the court, although approving the invasion of the corpus, emphasized that the spendthrift clauses were not destroyed. Mr. Justice Kiley concurred in *Thorne*.

Guttman was not mentioned in the petition for certiorari, although it is the latest decision of an Illinois court of review on the subject.

Illinois courts have drawn another pertinent distinction between the termination of ordinary trusts and that of spendthrift trusts.

In the former, the trustee is regarded as a mere stakeholder, and his only interest in a settlement is that he be protected in making the distribution. *Wolf* v. *Uhlemann*, 325 Ill. 165, 184, 156 N.E. 334. In the case of spendthrift

trusts, however, the state law makes it the trustee's obligation to maintain the trust in the trial and higher courts. *Altemeier* v. *Harris,* 335 Ill. App. 130, 138, 81 N.E. (2) 22; 403 Ill. 345, 86 N.E. (2) 229; *Tree* v. *Cont. Ill. Nat. Bk. & T. Co.,* 346 Ill. App. 509, 518, 105 N.E. (2) 324; *Stein* v. *La Salle Nat. Bk.,* 328 Ill. App. 3, 5, 65 N.E. (2) 216.

It would be an exercise in futility for the law to require the trustee to defend the spendthrift trust in all courts, and at the same time require him to permit its destruction at the behest of those he was opposing.

Petitioners have not cited a single Illinois case where a court of review has approved the termination of a testamentary spendthrift trust by agreement of the parties. Petitioners' effort to place *Wolf* in the category of a spendthrift trust is expressly discredited by *Altemeier* (403 Ill. 345, 351), and the State Supreme Court in *Wolf* did not once refer to the trust there as a spendthrift trust.

Even if the reservation in *Tree,* which the Court of Appeals in the case at bar "rejected as out of harmony with the controlling Illinois Supreme Court precedent", were valid, there was no showing here of a substantial basis for doubt, other than what the beneficiaries of the settlement affirmed to each other. Circuit Judge Castle fairly appraised their position when he said:

> "* * * the only doubts as to validity * * * are raised by the beneficiaries * * * for the self-serving purpose of solving the controversy they have created".

2. Petitioners' contentions under Count I in regard to the invalidity of the trust provisions are fully answered by the irrefutable decision of the Court of Appeals, as well as the able decision of the District Court. (App. 121-142)

3. As to Count II, petitioners refuse to read what they there alleged, with their eyes open. All their wailing about "their prolonged quest to bring a local lawyer to account" is sheer histrionics. Count I alleged their personal claim to all the trust assets to the exclusion of the other heirs (App. 28). Count II alleged that "for the reasons set forth in Count I, the assets of the Kathryn Breault trust are vested in the plaintiffs (petitioners here), including any accretions and undistributed income therefrom", and that they were "in the position of minor remaindermen". (App. 32) Since the filing of the amended complaint, they attained their majority. When the District Court decided that the petitioners had no interest in Kathryn's trust estate, and could establish none even if Oscar's will were declared invalid, it had no alternative except to dismiss Count II, which is based on their allegation that the trust assets vested in them as remaindermen. There is not one word that they were seeking the accounting on behalf of Oscar's estate.

Had they intended to claim the accounting on behalf of Oscar's estate, they knew that their remedy under Illinois law was to apply to the probate division of the Circuit Court of Cook County, Illinois, for appointment of a special administrator to prosecute a suit for accounting. *In re Estate of Breault,* 29 Ill. (2) 165, 179, 180, 193 N.E. (2) 824; *Parish* v. *Parish,* 29 Ill. (2) 141, 149, 193 N.E. (2) 761, 766.

That is why it would have been pointless to have given them leave to amend, which they did not even request, and to have required respondents to go through the formality of pleading to Count II.

That is what the Appellate Court of Illinois in *In Re Estate of Breault*, 63 Ill. App. (2) 246, 261, 211 N.E. (2) 424, meant when it said that since Count II sought the complete accounting "in their behalf", it removed that claim from the possible assets of Oscar's estate, inasmuch as they were contending in the state court there that the estate was not insolvent. The State Appellate Court would not permit them the luxury of inconsistency—a not infrequent failing of theirs. (See Appellees' Brief in Court of Appeals, pp. 1-4; copies filed in this Court.)

4. Their allusion to the will contest as a basis for settlement is devoid of merit. They ask this Court to accept as established fact the controverted allegations of their complaint to set the will aside.

There was no showing of any kind that Feigenholtz participated in the execution of Oscar's will, or that he knew about it, or that he was even in the city, at the time. He was not a beneficiary thereunder. That he was executor and trustee; that the will was drafted in his office; and that he would be entitled to compensation for his services as executor and trustee, did not under Illinois law make him a beneficiary, or create any presumption of undue influence against him.

In *Pond* v. *Hollett*, 310 Ill. 31, 141 N.E. 403, it was also argued that the decedent's lawyer, who was business agent of her large estate, whose law office drafted the will, and who was her executor and trustee, and was to receive large compensation under the will, was by reason thereof a beneficiary, and subject to a presumption of undue influence.

The Court overruled that contention and said, p. 36:

> "To say that one becomes a beneficiary by being paid what is fair and reasonable for services is utterly

> groundless. A dollar's worth of service for a dollar neither renders the one who performs the service nor the one for whom it is performed the beneficiary of the other. * * * the universal rule is that the benefit must be direct and not merely consequential."

The Court added, p. 37:

> "The selection by a testator of one with whom he has had business relations and in whom he had trust and confidence is the thing to be expected in the natural working of a normal and rational mind."

The Court distinguished cases such as *Gum* v. *Reep*, 275 Ill. 503, 114 N.E. 271, cited by petitioners on p. 20 of their petition for certiorari, and said, p. 37:

> "Counsel for appellees seek to sustain their position that Hollett received a substantial benefit raising a legal presumption of undue influence, but none of the cases cited sustain that position. * * * No case has been found which tends in any degree to sustain the argument."

In the *Breault* case, 63 Ill. App. (2) 246, 260, 211 N.E. (2) 424, the Court said:

> "In the case at bar, although respondents contend that Feigenholtz is a beneficiary, we do not regard him as such * * *."

The fact that Busch, who witnessed Oscar's will, was related to Feigenholtz, does not create an inference destructive of the validity of the will. *MacKay* v. *Costigan*, 179 Fed. (2) 125, 132, C.A. 7.

5. A word remains to be said about their claim that the courts below blocked efforts to terminate the litigation by

any settlement which did not maintain Feigenholtz as trustee. (Pet. for Cert. p. 30)

The problem that confronted the District Judge was to try to effect a settlement that would advance the interests of the heirs without destroying the spendthrift trust, which he believed the state law did not permit, or omitting Feigenholtz, who was chosen by both Oscar and his mother, and who, Judge Marovitz felt, had done a commendable job in the operation of the family business. (Appellee's App. 8, 9, 11) (*Cf. Thorne* v. *Cont. Ill. Nat. Bk. & T. Co.*, 18 Ill. App. (2) 163, 175, 151 N.E. (2) 398.)

Out of respect for Judge Marovitz's wishes, the trustees offered to invade the corpus to the extent of $583,000, and offered the heirs the election of two directors of their own choosing, out of a total of five, in order to facilitate the settlement suggested by the District Judge. (Appellees' App. 9-11)

Petitioners were unmoved.

II.

The decision below related solely to Illinois law; was obviously reasonable; and was made and passed upon by federal judges of experience in the jurisprudence of that State.

The Court has said that in questions of local law, it gives special weight to the statements in that respect of federal judges from the local bar, *Bernhardt* v. *Polygraphic Co. of Am.*, 350 U.S. 198, 204, 205; that in dealing with issues of state law, it is hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable, *U.S.* v. *Durham Lumber Co.*, 363 U.S. 522, 526, 527; and that the Court or-

dinarily accepts the determination of state law as found by the Court of Appeals, where the same finding is made by the District Court. *Appalachian Power Co.* v. *American Institute of C.P.A.*, 80 S. Ct. 16, 18 (Opinion by Mr. Justice Brennan as Circuit Justice).

District Judge Marovitz had been an Illinois judge many years.

Circuit Judge Castle had been an Illinois judge with extensive experience in probate matters, and an Attorney General of Illinois.

Circuit Judge Schnackenberg was a lawyer of long experience in the jurisprudence of Illinois, and had been Speaker of the Illinois House of Representatives, and thereafter an Illinois judge a long time.

Circuit Judges Kiley and Knoch, who sat *en banc,* had been Illinois judges. Judge Kiley sat on the Illinois Appellate Court bench many years, and as mentioned *supra,* wrote or participated in three of the Illinois opinions cited by the panel.

Therefore, when Judge Kiley joined in the denial of the petition for rehearing *en banc,* his action may be considered as a confirmation by an expert on the subject, that the panel had not decided the case in a way in conflict with applicable Illinois law.

The Court of Appeals reached a plainly reasonable and permissible result, and the petition for certiorari does not disclose the exceptionally clear showing of error that is required in matters of local law to change the result. Even

if reasonable arguments could be made on both sides, it would still be insufficient to disturb the decision of the Court of Appeals on such matters.

In *Estate of Spiegel* v. *Comm'r.*, 335 U.S. 701, 708, the Court was faced with a decision of the Court of Appeals on a difficult state law problem, which in the words of Mr. Justice Black, speaking for the majority, was "not an easy one". Refusing to reverse, Mr. Justice Black said:

> "It is sufficient for us to say that we think reasonable arguments can be made based on Illinois cases to support a determination of this question either for or against the petitioner's contention. Under these circumstances we will follow our general policy and leave undisturbed this Court of Appeals holding on a question of state law."

Petitioners' claims that the Court of Appeals decision conflicts with applicable state law, and has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure, as to call for this Court's supervision, are as untenable as their aspersions upon the federal courts below.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 203

In the

Supreme Court of the United States

OCTOBER TERM, 1965.

WILLIAM JOSEPH BREAULT and
BONNIE JO ELLEN KATHRYN BREAULT,
Petitioners,

vs.

HAROLD L. FEIGENHOLTZ and RICHARD DAHM, individually and Executors and Trustees under the Last Will and Testament of KATHRYN M. BREAULT, deceased; HAROLD L. FEIGENHOLTZ, as Executor of the Last Will and Testament of OSCAR J. BREAULT, deceased; HAROLD L. FEIGENHOLTZ, as Trustee and EUGENE A. BUSCH, Successor Trustee under the Last Will and Testament of OSCAR J. BREAULT, deceased; IRMA MEYERS, LITTLE SISTERS OF THE POOR OF CHICAGO, ST. HEDWIG INDUSTRIAL SCHOOL FOR GIRLS, POLISH MANUAL TRAINING SCHOOL FOR BOYS, ESTELLE ANGELA BREAULT, KENNETH BREAULT and WESLEY MEMORIAL HOSPITAL, a Corporation,

Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I.

Respondents Feigenholtz, et al, who claim no beneficial interest in the controversy, would lead this Court into

the same misinterpretation of *Altemeier* v. *Harris,* 403 Ill. 345, into which they led the courts below.

Altemeier did not distinguish *Wolf* v. *Uhlemann,* 325 Ill. 165, in the manner which Respondents' Brief in Opposition represents to this Court. (Respondents' Brief in Opposition, pp. 5, 7).

In the first quotation from *Altemeier* on p. 5 of Respondents' Brief in Opposition the words "no trust existed" are omitted from the first sentence. These omitted words and the next sentence of the paragraph which is also omitted show that the first sentence of the paragraph which the Court of Appeals also partially quoted, referred not to *Wolf* but to five other cases in which no trusts were involved. (Petition for Writ of Certiorari, p. 16 *Altemeier* v. *Harris,* 403 Ill. 345, 351)

Respondents' Brief In Opposition by misplacement of the periods in the next two sentences quoted in the same paragraph seeks to convey the impression which later becomes assertion (Respondents' Brief In Opposition, p. 7) that *Altemeier* distinguished *Wolf* on the ground that in *Wolf* no spendthrift trust was involved.

The same tactic succeeded in the Court of Appeals. In their brief in that Court, respondents asserted *"Wolf* v. *Uhlemann,* 325 Ill. 165, 156 N.E. 334, strongly relied upon by plaintiffs, was distinguished by the State Supreme Court in *Altemeier* v. *Harris,* 403 Ill. 345, 351, 86 N.E. 2d 229, on the grounds that *Wolf* involved only a trust for accumulation and not a spendthrift trust and 'there was no discussion of the power to terminate a spendthrift trust.'" Respondents' brief in the Court of Appeals also asserted "the Appellate Court said at p. 138, that *Wolf* did not involve a spendthrift trust * * *." (Appellees' brief in the United States Court of Appeals, pp. 21-22).

Nowhere in the Appellate Court opinion (335 Ill. App. 130) does such a statement appear.

Respondents' Brief in Opposition and the Court of Appeals' opinion are silent with respect to the real distinction between *Wolf* and *Altemeier*: In *Wolf* there was threatened litigation over the validity of an instrument which only if valid would have created a spendthrift trust. In *Altemeier* there was a pretended controversy over an active subsisting spendthrift trust validated and construed many years before. *Altemeier* v. *Harris,* 403 Ill. 345, 356-357. James, *Illinois Probate Law and Practice,* 1951, Section 11.17, p. 101; Bogert, *Trusts and Trustees,* 2nd Ed. 1962, Section 1,009, p. 571; and See: Griswold, *Spendthrift Trusts,* 2nd Ed. 1947, Section 552, pp. 600-602.

Respondents' Brief in Opposition deliberately avoids mention or discussion of the fact that in *Altemeier* there was no genuine controversy, the will in question having been validated 40 years earlier and construed 25 years earlier in a decree affirmed by the Supreme Court of Illinois binding on all parties to the proposed settlement agreement.

Respondents' Brief in Opposition, p. 6, asserts that it is necessary to revert "parenthetically" to the Appellate Court decision to ascertain what it said that the Supreme Court of Illinois was in accord with." But when this is done it is abundantly clear that the Appellate Court decision was based upon the absence of a genuine controversy and not upon the presence of spendthrift provisions in a challenged trust. The Supreme Court of Illinois itself made this clear:

> "The Appellate Court decided the case principally upon the proposition of the failure of the appellants to establish that they come within the principles of

the family-settlement doctrine, and of *res judicata.* We think the Appellate Court was entirely correct in its finding that the proof failed to establish the right to a decree approving the family settlement, because of failure to prove those things that are required under the rule. In the first place, there must be a reasonable and substantial basis for the belief that a prolonged and extensive litigation will result over the distribution of the estate. In view of the fact that the will contest concluded with a decree binding all of the parties to the suit, and all persons claiming under them, in view of the decree construing the will, approved by the Supreme Court, and in view of the general principles set out herein regarding the termination of trusts, there could not be any reasonable ground that such litigation could be successful.

"Neither do we believe there was any doubt as to the construction of the will after the decision of this court rendered in *Smith* v. *Thomas,* 317 Ill. 150. In the *Uhlemann* case we said, among other things: "Undoubtedly, the members of a family are not privileged to alter the terms and provisions of a will merely for the convenience of the family or for the sole purpose of securing greater individual financial advantages than those specified in the will and intended by the testator. It seems quite clear that this is the underlying motive in the present case.

"We are fully in accord with the decision of the Appellate Court that the appellants have not brought themselves into a position where they can take advantage of the family-settlement doctrine; and are further of the opinion the Appellate Court was correct in the application of the *res judicata* effect of the former decree construing the will of Daniel C. Stover.

"In addition to the foregoing, we have announced the rules prohibiting the terminations of trusts where special considerations bring the case beyond the scope of the family-settlement doctrine." (403 Ill. 345, 356-357)

The requirements of a family-settlement are (a) a reasonable and substantial basis for the belief that a prolonged and extensive litigation will result over the distribution of the estate, and (b) substantial doubt with respect to the validity or construction of the challenged instrument. *Wolf* v. *Uhlemann,* 325 Ill. 165, 183; *Altemeier* v. *Harris,* 403 Ill. 345, 350-351, 356-357; *Tree* v. *Continental Illinois National Bank and Trust Co.,* 346 Ill. App. 509, 520; *Stein* v. *LaSalle National Bank,* 328 Ill. App. 3, 7. When these requirements are present spendthrift provisions do not bar the settlement. Thus, in *Wolf* v. *Uhlemann,* 325 Ill. 165, when these requirements were met, "there was no discussion of the power to terminate a spendthrift trust." Had there been no spendthrift trust involved in *Wolf* v. *Uhlemann,* 325 Ill. 165, the court in *Altemeier* v. *Harris,* 403 Ill. 345, 351 would have noted that fact but it simply noted that there was no discussion. The authorities cited in the Petition for Writ of Certiorari, p. 16, which respondents do not challenge, and *Hartley* v. *Heirs of Wyatt,* 281 Ill. 321, 324, which is cited in Respondents' Brief in Opposition at p. 7, show that *Wolf* actually did involve a spendthrift trust. The author of the opinion in *Wolf,* Mr. Justice Farmer, was the author of *Wallace* v. *Foxwell,* 250 Ill. 616, and *Wagner* v. *Wagner,* 244 Ill. 101. He certainly knew that the trust in *Wolf* was a spendthrift trust as did the court in *Altemeier* which cited *Bennett* v. *Bennett,* 217 Ill. 434, and *Wagner* v. *Wagner,* 244 Ill. 101 (403 Ill. 345, 352). See Petition for Rehearing, pp. 6-7.

When deviation from a trust instrument is permissible, spendthrift provisions in such trust instrument are no bar. That is why the Appellate Court of Illinois in *Thorne* v. *Continental Illinois National Bank and Trust Company,* 18 Ill. App. 2d, 163, said at p. 175:

> "We do not believe the fact that the trusts in question contained 'spendthrift clauses' * * * should limit a court of equity in its directing an invasion of the corpus, as no case cited, which permitted deviation from trust provisions, indicated that spendthrift clauses are to be considered in any different category than other trust provisions when permitting the deviation from the corpus restrictions."
>
> Likewise in *Quigley,* 1 T.C. 837, the court said:
>
> "The trusts certainly are no more impregnable than the will by which they were established."

Guttman v. *Schiller,* 39 Ill. App. 2d, 58, 187 N.E. 2d 315, involved an unsuccessful attempt to upset a family-settlement. The court said at p. 66:

> "Many cases are cited in support of the proposition that beneficiaries have no right to alter the terms of a trust. It would be more accurate to say that the cases hold that beneficiaries cannot modify or terminate a trust except under certain conditions. If the conditions are met the trust can be terminated."

The instant case does not involve the *termination* of a spendthrift trust; the spendthrift trust contemplated under the purported will of Oscar J. Breault has not yet been funded. App. 80. It has not yet become effective. If petitioners succeed in their will contest, the trust under Oscar Breault's purported will will never become effective.

The cases cited in the Petition for Writ of Certiorari at p. 20 are for the proposition that the circumstances of the execution of the purported will of Oscar J. Breault establish *prima facie* the charge of undue influence. They are cited to show that the controversy sought to be settled is bona fide. The genuineness of the controversy is also shown in the stipulation of facts. App. 74-80.

Once it is resolved here that the District Court indeed does have the jurisdiction or power to approve a family-settlement, the District Court can pass on any other objections which are thought to have merit including the genuineness of the controversy. However, the family-settlement doctrine does not require that the contestants in a will contest win the will contest before the family-settlement doctrine is applicable.

Respondents' Brief in Opposition urges, p. 7, that the family-settlement doctrine does not apply because "no family was *being* torn asunder in the case at bar. Years of bitter litigation while Oscar J. Breault was alive had taken care of that, *In Re Estate of Breault,* 29 Ill. 2d 165, 167, 193 N.E. 2d 824, 826." (Italics ours) Petitioners were 15 and 14 years old respectively when their father died and were never parties to any litigation until the will contest. Respondents' contention ignores the salutary efforts which the beneficially interested parties have made to save the estates of Kathryn Breault and Oscar Breault from depletion by further litigation. Surely an executor's duty to defend a will contest does not require him to advance spurious defenses and exhaust the estate.

II.

The decision below, misinterpreting Illinois law, unreasonably requires the beneficially interested parties (all of whom by now, by reason of what has transpired in the past six years, may well be convinced that there was, indeed, undue influence) to litigate to the bitter end, and for some of them, either to lose or to abdicate interests in the estates involved, to the advantage of the attorney charged with undue influence.

To hold that a federal court of equity may approve the settlement of a will contest except when the challenged in-

strument contains spendthrift provisions, unreasonably stresses the form of the challenged instrument. We submit that when a family-settlement to avoid prolonged and extensive litigation over a genuine controversy is permissible, it matters not what language may appear in the purported will.

To bar settlement by reason of the testator's supposed "intention" when that intention is the subject of the controversy begs the question.

Professor Bowe and Parker have put it this way:

> "As in the case of wills in general, it would seem undesirable to force the parties to litigate when they are ready to make mutual concessions at the outset and avoid litigation.
>
> "* * * While it may seem undesirable to permit the heirs, next of kin, devisees and legatees to ignore testator's will and to distribute his estate on a basis different from that which he has prescribed in his will it would seem to be an evil still greater to create a legal restriction under which the adversary parties cannot compromise their rights but in which they are given a choice only between litigation to establish their rights completely, and a total abandonment of their rights." Volume 2, p. on Wills, Bowe, Parker Rev. (1960) Section 25.5, p. 632.

In this diversity action the jurisdiction of this Court is invoked by reason of the failure of the courts below to apply the controlling decision of the highest State Court, whatever may have prompted this result. Although permitted by Rule 24, the brief of respondents, Feigenholtz, et al, in opposition, includes no objection to this Court's jurisdiction. It is suggested that the courts below permitted themselves to be misled by the spurious con-

tentions and the manner of argument of respondents, Feigenholtz, et al, as exemplified in their brief here.

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